Filed 1/17/19 P. v. Rodriguez CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. NICK RODRIGUEZ, Defendant and Appellant.	D072907 (Super. Ct. No. SCD269288)

APPEAL from a judgment of the Superior Court of San Diego County, Frederick Maguire, Judge. Reversed and remanded with directions.

Janice R. Mazur, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Seth Michael Friedman and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury convicted Nick Rodriguez of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and found true an allegation he personally used a dangerous and deadly weapon (§ 1192.7, subd. (c)(23)).[2] The court found true allegations Rodriguez had a prior strike conviction (§§ 667, subds. (b)–(i), 1170.12), a prior serious felony conviction (§§ 667, subd. (a), 1192.7, subd. (c)), and two prior prison commitment convictions (§ 667.5, subd. (b)). The court sentenced Rodriguez to eight years in prison, consisting of the middle term of three years for the assault conviction plus five years for the serious felony prior conviction. The court exercised its discretion to dismiss the punishment for the prior strike conviction and the prior prison commitment convictions in the interest of justice (§ 1385).

Rodriguez appeals. He contends we must reverse the judgment because the court prejudicially erred by refusing his request to instruct the jury on the lesser included offense of misdemeanor assault (§§ 240, 241, subd. (a)).

Additionally, while this appeal was pending, the Legislature enacted sections 1001.35 and 1001.36 (Stats. 2018, ch. 34, § 24), effective June 27, 2018, to authorize

---

1 Further statutory references are to the Penal Code unless otherwise indicated.

2 The jury found Rodriguez not guilty of willfully resisting, delaying, and obstructing a police officer (§ 148, subd. (a)(1)).

pretrial diversion for defendants with mental disorders.[3] The Legislature also amended sections 667, subdivision (a), and 1385, subdivision (b), effective January 1, 2019, to give courts the discretion to dismiss the punishment for prior serious felony convictions. Rodriguez contends both sets of statutes apply retroactively to this case. He requests we conditionally reverse and remand the matter to the court to allow the court an opportunity to exercise its discretion under them.

We conclude the court did not err by failing to instruct the jury on the lesser included offense of misdemeanor assault. However, we conclude newly enacted sections 1001.35 and 1001.36 as well as newly amended sections 667, subdivision (b), and 1385, subdivision (b), apply retroactively to this case. Accordingly, we reverse the judgment to allow the court an opportunity to exercise its discretion under these statutes.

II

BACKGROUND

Prosecution Evidence

One morning, a man approached a maintenance worker asking for help. The man told the maintenance worker Rodriguez was smashing beer bottles against the man's truck window. The man and the maintenance worker followed Rodriguez, who was carrying a six-pack of beer bottles, for about 100 yards to a construction site. Rodriguez stopped at

---

[3] The Legislature subsequently amended section 1001.36, effective January 1, 2019, to eliminate diversion eligibility for defendants charged with certain specified offenses, to give the court the discretion to require defendants make a prima facie showing of diversion eligibility, and to give the court the authority to address restitution for victims of diverted offenses. (Stats. 2018, ch. 1005, § 1). All references to section 1001.36 are to this version of the statute.

the construction site and hurled a beer bottle at some construction workers on scaffolding. Rodriguez was talking to himself and screaming incoherent statements. The construction site manager called 911 and reported the incident to the police department.

The maintenance worker continued to follow Rodriguez to a nearby park where the maintenance worker joined two coworkers. About then, Rodriguez noticed the maintenance worker had been following him. Rodriguez approached the maintenance worker and the coworkers. Rodriguez kept repeating, "Hey, come here."

The maintenance worker and the coworkers laughed at Rodriguez. The maintenance worker told Rodriguez to, "Get the hell away from me. Get away."

Rodriguez then took out a beer bottle and hurled it at the maintenance worker from no more than five feet away. The bottle whizzed past the right side of the maintenance worker's head, coming within two to three inches of it.

The maintenance worker and the coworkers surrounded Rodriguez and squared off with him, but ultimately decided not to fight him. Rodriguez then staggered 100 to 150 feet away and sat down at park table, where he remained until police officers arrived.

The officers arrested Rodriguez and took Rodriguez to a substation holding cell. While in the holding cell, Rodriguez got up, went to the observation window, and started kicking the window as hard as he could with the bottom of his foot. He was sweating profusely and yelling profanities. When he failed to comply with multiple warnings to stop kicking the window, police officers placed in him a restraint. The restraint consisted of a piece of cloth that wrapped around Rodriguez, kept him sitting up, and prevented him from kicking, punching, or flailing his limbs.

Defense Evidence

Rodriguez testified he is a paranoid schizophrenic. He was walking around carrying a six-pack of beer and saying "howdy do" to people when he passed by the man in the truck. He thought it was odd for the man to be just sitting there. He believed the man was watching and waiting for him. He did not remember hitting the truck window with a bottle, but he remembered hitting it with his fist and saying, "Get out of here, man. You're harassing me."

Rodriguez continued walking and talking. He did not remember what he said to the construction workers. He also did not remember throwing a beer bottle at them. He eventually noticed the maintenance worker following him. He saw the maintenance worker sprint across the street and "got spooked." He feared for his life because his grandmother once told him a lot of people, including Portuguese gang members, were after him. He looked around, told the maintenance worker to, "Come here," and threw a bottle at the maintenance worker's head. When he realized the maintenance worker and the coworkers were not a threat and were more scared of him than he was of them, he sat down and waited.

At the police substation, he became upset in the holding cell because the police officers laughed at him. He also saw something wicked in their eyes and thought they had raped his brother.

III

DISCUSSION

A

1

During the jury instruction conference, Rodriguez requested the court instruct the jury on the lesser included offense of simple, or misdemeanor, assault. Defense counsel argued the instruction was necessary because the jury could find Rodriguez committed assault without necessarily finding the beer bottle was a deadly weapon. The prosecutor argued there was insufficient factual support for an instruction on misdemeanor assault because Rodriguez admitted throwing the bottle at a human being's head.

The court denied the request for the instruction, reasoning:

> "[I]f [the jurors are] not satisfied that he used the deadly weapon, or that the beer bottle is a deadly weapon, if they're not satisfied beyond a reasonable doubt, then he's not guilty across the board. Okay.
>
> "So what makes it an assault here is the use of the projectile. I see it a little bit different with the words 'force likely to produce great bodily injury,' than the [misdemeanor assault] is the—by definition, the lesser-included offense. But the elements are different on the [lesser-included offense].
>
> "I saw this one coming, and I was looking and doing some research indicating that this is not a situation that the [lesser-included offense] is within the scope of the evidence presented."

Rodriguez contends the court prejudicially erred by refusing his request to instruct the jury on the lesser included offense of misdemeanor assault. We review the court's decision de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

" 'A trial court has a sua sponte duty to "instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." [Citation.] Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed the lesser, but not the greater, offense. "The rule's purpose is ... to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence." [Citation.] In light of this purpose, the court need instruct the jury on a lesser included offense only "[w]hen there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of" the lesser offense.' " (*People v. Landry* (2016) 2 Cal.5th 52, 96.)

Here, the parties do not dispute misdemeanor assault is a lesser included offense of assault with a deadly weapon. (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 747–748.) "Thus, the question posed by defendant's claim is whether a reasonable jury could have found that defendant committed only [misdemeanor] assault and not an assault with a deadly or dangerous weapon or force likely to produce great bodily injury." (*Id.* at p. 748.) We conclude a reasonable jury could not have so found.

Rodriguez admitted he intentionally threw a beer bottle at the maintenance worker's head. The maintenance worker was no more than five feet away from Rodriguez at the time. The beer bottle whizzed past the right side of the maintenance worker's head, missing by only a few inches. A beer bottle, when used as a missile in this manner, constitutes a deadly or dangerous weapon. (*People v. Cordero* (1949) 92

Cal.App.2d 196, 199; see, e.g., *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 532; *People v. Martinez* (1977) 75 Cal.App.3d 859, 862–864.) Accordingly, court did not err by failing to instruct the jury on misdemeanor assault.

B

Rodriguez next contends sections 1001.35 and 1001.36 apply retroactively to this case because the statutes have an ameliorative effect on punishment. The People contend these statutes do not apply retroactively because the Legislature did not intend them to apply retroactively. We agree with Rodriguez.

1

Sections 1001.35 and 1001.36 authorize pretrial diversion for defendants with mental disorders. " '[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment ...." (§ 1001.36, subd. (c).) A court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b)(1).)

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

2

As a canon of statutory interpretation, we generally presume laws apply prospectively. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307 (*Lara*).) However, the Legislature may explicitly or implicitly enact laws that apply retroactively. (*Ibid.*) To determine whether a law applies retroactively, we must determine the Legislature's intent. (*Ibid.*)

" 'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.' " (*Lara*, *supra*, 4 Cal.5th at p. 307, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).) " 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily

intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citations.]" (*Lara*, at p. 308.)

The *Estrada* rule applies to section 1001.36 because section 1001.36 lessens punishment by giving defendants the possibility of diversion and then dismissal of criminal charges. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*), review granted Dec. 27, 2018, S252220.) In addition, applying section 1001.36 retroactively is consistent with the statute's purpose, which is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).)

The statute's definition of pretrial diversion, which indicates the statute applies at any point in a prosecution from accusation to adjudication (§ 1001.36, subd. (c)), does not compel a different conclusion. "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.)

The statute's legislative history also does not compel a different conclusion. The statute was part of an omnibus bill addressing more than a dozen diverse healthcare-related concerns. One of the concerns pertained to criminal defendants with mental

disorders that prevent them from being competent to stand trial. (See Stats. 2018, ch. 34, §§ 25–27 [amending §§ 1370, 1370.01, 1372].) Another of the concerns pertained to criminal defendants with certain mental disorders that played a significant role in their crimes. (See Stats. 2018, ch. 34, § 24 [adding §§ 1001.35 & 1001.36].) The bill's handling of these two concerns intersected in at least one key respect: the bill added a provision authorizing a court, after finding a defendant mentally incompetent to stand trial and before transporting the defendant for treatment to restore competency, to grant the defendant diversion under section 1001.36 if the defendant is otherwise eligible for such diversion. (§ 1370, subd. (a)(1)(B)(iv)–(v).) In other words, a defendant found mentally incompetent to stand trial need not be restored to competency before being considered a candidate for diversion under section 1001.36.

In our view, this aspect of the bill evidences an intent to streamline mental health treatment for criminal defendants who are both mentally incompetent to stand trial and eligible for mental health diversion. Indeed, this intent is reflected in a legislative committee report, which described the bill's actions as including the implementation of "a mental diversion program with a focus on reducing the number of Incompetent to Stand Trial referrals to the Department of State Hospitals." (Assem. Com. on Budget, Conc. in Sen. Amends. to Assem. Bill No. 1810 (2017-2018 Reg. Sess.) as amended June 12, 2018, p. 7.) In the People's view, this aspect of the bill and the committee report's characterization of it evidences an intent for section 1001.36 to be "a decidedly *pretrial* mental health diversion measure" and, therefore, applicable only prospectively, not retroactively. However, as previously explained, the fact the statute is designed to

ordinarily operate pretrial does not preclude it from applying retroactively. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, citing, e.g., *Lara*, *supra*, 4 Cal.5th 299.)

Furthermore, we note the California Supreme Court decided *Lara* before the Legislature enacted section 1001.36 and the Legislature is deemed to have been aware of the decision. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Had the Legislature intended for the courts to treat section 1001.36 in a different manner, we would expect the Legislature to have expressed this intent clearly and directly, not obscurely and indirectly. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter the *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].) Consequently, we conclude section 1001.36 applies retroactively to this case.

3

This conclusion does not, however, end our inquiry. Effective January 1, 2019, section 1001.36 provides, "At any stage of the proceedings, the court *may* require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (b)(3), italics added.)

Based on this provision, the People contend remanding the case to allow the court to exercise its discretion is unnecessary because Rodriguez has not established he can

make the requisite prima facie showing. We find this contention unpersuasive for two reasons. First, assuming, without deciding, the prima facie showing provision applies retroactively, the provision is discretionary, not mandatory. Second, the purpose of the provision is to determine whether a defendant is potentially eligible for diversion. (See Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended August 23, 2018, p. 2 [the prima facie showing provision "[a]uthorizes a court to request a prima facie hearing where a defendant must show they are potentially eligible for diversion"].)

In this case, Rodriguez testified he has paranoid schizophrenia, he received social security disability income for this disorder, and this disorder prompted his decision to throw the beer bottle at the maintenance worker. He made similar statements during his probation interview. Additionally, the court, which had experience handling mental health calendars, stated at the sentencing hearing, "that while no doctor came in and testified, there's clear evidence of psychiatric issues." The court further stated it believed Rodriguez probably had paranoid schizophrenia because Rodriguez's behavior was consistent with testimony the court had previously heard from doctors about how paranoid schizophrenia manifests itself. Rodriguez's testimony and statements coupled with the court's observations establish Rodriguez's potential eligibility for diversion.

Whether the court will be satisfied Rodriguez's mental disorder was a significant factor in his commission of the assault, whether a qualified mental health expert will believe Rodriguez's symptoms will respond to treatment, and whether the court will be satisfied treating Rodriguez in the community will not pose an unreasonable risk of

danger to public safety are questions not answered or capable of being answered at this juncture. Rodriguez has not had an opportunity to develop the requisite expert evidence and the court has not had an opportunity to consider whether he would be an appropriate candidate for diversion. By remanding the matter, which we conclude is the most appropriate course, both Rodriguez and the court will have these opportunities.

C

Finally, the People contend we need not remand this case for resentencing under sections 667, subdivision (a), and 1385, subdivision (b), because the record shows doing so would be futile. We disagree.

Newly effective amendments to sections 667, subdivision (a), and 1385, subdivision (b), which the People concede apply retroactively to this case (*Lara*, *supra*, 4 Cal.5th at pp. 307–308 & fn. 5; *People v. Francis* (1969) 71 Cal.2d. 66, 75–76; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973), give the court the discretion to dismiss the punishment for a prior serious felony conviction. When a court is unaware it had the discretion to reduce a sentence, "[r]emand is required unless the record reveals a clear indication that the [court] would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.]" (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.)

The record in this case does not reveal such a clear indication. In explaining its sentencing choices, the court stated,

> "So again, the strike is remote. He was 16, he's 40 now or 41, whatever, somewhere around there, and he's done nothing in between. The [district attorney] has a very good point because the conduct in

> between has not exactly been stellar. And there's been a lot of violations. So I'm going to strike the strike prior—I'm going to strike the prison priors. Once again, because I believe that it makes the number[s] too high, it's an excessive punishment. The court has an obligation under the 8th Amendment to make sure that sentencing is fair. Nobody was hurt, clearly you're out of it at the time that this is happening. And your conduct can be considered both ways, you know, kind of just goofy. But you know, you chased those couple guys down the street. And there's really three separate instances. One is the guy in the pickup truck, two is the guys at the construction site, and three is at the park where they catch you on the video. All right. But you know, the video is also telling because–again, layman's terms, you just ain't right. There's something not right about this whole thing and he's not right.
>
> "... *I can't strike the five year prior and I wouldn't.* This is not going to be a two year case anyway. ... I see this as a run of the mill 245 case. Okay. It's not exaggerated or exacerbated, although I could give you the upper term based on the fact that it really is three separate incidents. But I could also go to the lower term because of the psychiatric issues. And again, I think that while no doctor came in and testified, there's clear evidence of psychiatric issues. But when you throw it all in the wash, it comes out in the middle of the road. Okay. So I'm going to select the middle term of three years because I don't really see much in way of mitigation. And the aggravation is tempered by the circumstances or watered down by the circumstances." (*Italics added.*)

The court's statement does not reflect an intent to impose the maximum sentence or even a sentence of a predetermined number of years. Rather, it reflects an intent to use the then available tools to impose a constitutionally fair sentence that accounted for the nature and circumstances of Rodriguez's crime, his recidivism, and his mental health issues. Although the court stated it would not have dismissed the punishment for the prior serious felony conviction, the context of this statement indicates only that the court believed an unenhanced sentence was not sufficient punishment for Rodriguez's crime. The context does not foreclose the possibility the court might have made different

sentencing choices to achieve a fair and appropriate sentence, such as imposing an upper term sentence for the assault along with additional terms for the prior prison commitment convictions, had the court had the discretion to dismiss the punishment for the serious felony prior conviction. Thus, we cannot conclude it would be futile to remand the matter to allow the court an opportunity to exercise its newly authorized discretion. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428.)

IV

DISPOSITION

The judgment is reversed. The cause is remanded to the superior court with directions to conduct a diversion eligibility hearing under section 1001.36. If the court determines Rodriguez qualifies for diversion under section 1001.36, then the court may grant diversion. If Rodriguez successfully completes diversion, then the court shall dismiss the charges.

If the court determines Rodriguez is ineligible for diversion, or Rodriguez does not successfully complete diversion, then the court shall reinstate Rodriguez's conviction and conduct a new sentencing hearing to consider whether to exercise its newly conferred discretion under amended sections 667, subdivision (a), and 1385, subdivision (b), to

dismiss the punishment for the prior serious felony conviction. The court shall then prepare an amended abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

AARON, J.